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# In the Supreme Court of the United States

OCTOBER TERM, 1943

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No. 405

SCHENLEY IMPORT CORPORATION, PETITIONER

v.

THE UNITED STATES

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF CUSTOMS AND PATENT APPEALS*

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**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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## **OPINIONS BELOW**

The opinion of the United States Customs Court (R. 7-9) is reported in Abstract 47420, 78 Treasury Decisions Advance Sheets, August 6, 1942, page 42. The opinion of the Court of Customs and Patent Appeals (R. 16-17) is reported in 79 Treasury Decisions Advance Sheets, August 19, 1943, page 39.

## **JURISDICTION**

The judgment of the United States Court of Customs and Patent Appeals was entered on July 6, 1943 (R. 18). The petition for a writ of cer-

tiorari was filed on September 30, 1943. The jurisdiction of this Court is invoked under Section 195 of the Judicial Code, as amended, 28 U. S. C., Section 308.

#### QUESTION PRESENTED

Whether Section 710 of the Revenue Act of 1938 (*infra*, p. 11), increasing the internal revenue tax on imported distilled spirits twenty-five cents per proof gallon superseded Article VIII of the trade agreement between the United States and Cuba (*infra*, pp. 11-12), which provided that the articles enumerated in Schedule II annexed to the agreement (including rum in bottles containing each one gallon or less), should be exempt from all taxes in excess of those in force on the effective date of the agreement, September 3, 1934.

#### STATUTES INVOLVED

The relevant provisions of the several revenue Acts involved and of the trade agreement between the United States and Cuba are set forth in the Appendix, *infra*, pp. 9-25.

#### STATEMENT

On August 24, 1934, the United States and the Republic of Cuba entered into a reciprocal trade agreement which became effective September 3, 1934, fixing rates of duties on various articles of merchandise imported into the United States from Cuba, including rum in bottles containing

each one gallon or less (49 Stat. 3559). Article VIII of the said trade agreement provided that the articles of merchandise (including the rum) enumerated in Schedule II annexed thereto, with respect to which a rate of duty was specified in Column 2, should be exempt from all taxes, fees, charges, or exactions, in excess of those imposed by the laws of the United States in effect on the day on which the agreement should come into force (*infra*, p. 11). On September 3, 1934, the effective date of the agreement, Section 600 (a) (4) of the Revenue Act of 1918 (40 Stat. 1105), as amended by the act of February 26, 1926 (44 Stat. 104), and by Section 2 of the Liquor Taxing Act of 1934 (48 Stat. 313), provided for an internal revenue tax of \$2.00 per proof gallon on imported distilled spirits (*infra*, pp. 9-10). Subsequent to the effective date of the trade agreement Section 600 (a) (4) of the Revenue Act of 1938 was further amended by Section 710 of the Revenue Act of 1938 (52 Stat. 572), and the internal revenue tax on all imported distilled spirits, except brandy, was increased from \$2.00 to \$2.25 per proof gallon (*infra*, p. 11).

On July 1, 1938, the effective date of Section 710, the petitioner imported into the United States at the Port of New York from Cuba certain rum in bottles containing each one gallon or less and entered the same for warehouse (R. 8). The rum was withdrawn from the ware-

house for consumption on or before July 11, 1938, and the Collector of Customs, in addition to the regular duty, concerning which there is no controversy, assessed an internal revenue tax of \$2.25 per proof gallon thereon pursuant to Section 600 (a) (4) of the Revenue Act of 1918, as amended by Section 710 of the Revenue Act of 1938 (R. 8).

The petitioner filed a protest against the assessment of the additional twenty-five cents per proof gallon on the rum, contending that the increased amount was illegally assessed due to the fact that Article VIII of the Cuban Trade Agreement exempted the rum from all internal revenue taxes in excess of the \$2.00 per proof gallon, the amount imposed by the laws of the United States on the effective day of the agreement (R. 4-5).

The United States Customs Court sustained the protest, holding that the increase of twenty-five cents per proof gallon in the internal revenue tax did not apply to the rum involved for the reason that the terms of the Cuban Trade Agreement exempted such rum from internal revenue taxes in excess of \$2.00 per proof gallon, that being the amount imposed on the effective date of the trade agreement (R. 7-9). The Customs Court based its judgment in this case on its decision in the case of *Rathjen Brothers v. United States*, reported in 78 Treasury Decisions Advance Sheets, July 16, 1942, page 16, a copy of

which decision is set forth in the Appendix (*infra*, pp. 19-25).

The Court of Customs and Patent Appeals reversed the judgment of the Customs Court (R. 16-17) on the grounds that Section 710 of the Revenue Act of 1938 was absolutely irreconcilable with the provisions of Article VIII of the Cuban Trade Agreement; that the statute being later in time superseded the provisions of Article VIII of the trade agreement with respect to the rum involved; and that the Congress, when enacting Section 710 of the Revenue Act of 1938, did not intend the Cuban rum involved to be exempt from the increase in the internal revenue tax. The Court of Customs and Patent Appeals also based its judgment in this case on its decision in the companion case of *United States v. Rathjen Brothers*, reported in 79 Treasury Decisions Advance Sheets, August 19, 1943, page 35, a copy of which decision is also set forth in the Appendix (*infra*, pp. 12-19).

#### ARGUMENT

The rule of construction that a subsequent Act of the Congress will be held to supersede a prior inconsistent treaty, which was applied to the statute and trade agreement by the court below in reversing the Customs Court, is well established. *Rainey v. United States*, 232 U. S. 310, 316; *Whitney v. Robertson*, 124 U. S. 190, 194; *Hijo v. United States*, 194 U. S. 315, 324. The court did



not ignore the other equally well-established rule of construction that a subsequent Act of the Congress should, if possible, be harmonized with a prior inconsistent treaty or other international agreement. After expressly mentioning the latter rule (*infra*, p. 16), the court found that Section 710, which levied a tax of \$2.25 per proof gallon on all distilled spirits imported into the United States,<sup>1</sup> was irreconcilably in conflict with the provisions of Article VIII of the Cuban Trade Agreement, and could not be harmonized with the latter without reading into the statute a destructive exception which was not there. The court then reached the conclusion that the Congress, at the time it enacted the Revenue Act of 1938, had in mind the international obligations of the United States, pointing out significantly that in Section 704 of that Act the Congress, in changing the manner of measuring lumber for tax purposes, which increased the tax, had exempted from the change all lumber upon which an increased tax would be in conflict with any international obligation of the United States.<sup>2</sup> Section 704 (b) reads as follows:

Each sentence of the amendment made by subsection (a) shall become effective (1) on the sixtieth day after the date of the enactment of this Act *unless in conflict with*

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<sup>1</sup> Brandy was excepted from the increase in the tax.

<sup>2</sup> In section 22 (b) (7) of the same act, the Congress excluded from taxation "income of any kind, to the extent required by any treaty obligation of the United States."

*any international obligation of the United States* or (2) if so in conflict, then on the termination of such obligation otherwise than in connection with the undertaking by the United States of a new obligation which continues such conflict. [Italics supplied.]

From this the court deduced that the Congress intended that the increased tax should be assessed under Section 710 on Cuban rum notwithstanding Article VIII of the Cuban Trade Agreement, since the Congress, had it intended otherwise, would have expressly so provided as it did in the case of lumber in Section 704 of the same act. Thus, in the final analysis, the decision of the court below was based on the fundamental principle that in the construction of a statute the intention of the legislature must prevail. The construction placed by the court below on the statute is sound, both because the statute is clearly in conflict with the trade agreement and being later in time must prevail, and because the intention of the Congress, to increase the tax on distilled spirits despite conflicting provisions in international obligations, is reflected from the fact that in the same Act it expressly saved international obligations when it desired to do so in connection with internal revenue taxes on imported lumber. The rum involved was imported and withdrawn from the warehouse after Section 710 of the Revenue Act of 1938 became effective, and there are no other questions concerning its taxability.

## CONCLUSION

The decision of the court below is clearly correct, and there are no conflicts of decision. Furthermore, article VIII of the Cuban Trade Agreement of 1934 has been modified by the Supplementary Agreement of December 23, 1941 (55 Stat. 1449), and now expressly provides that either party may impose "at any time on the importation of any article a charge equivalent to an internal tax imposed in respect of a like domestic article."<sup>3</sup> The case is not, therefore, of large public importance. The petition is without merit and should be denied.

Respectfully submitted.

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OCTOBER 1943.

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<sup>3</sup> A similar understanding was reached in an exchange of notes, signed April 25, 1942 (56 Stat. 1497), in connection with the Haitian Trade Agreement (49 Stat. 3737), which also fixed new rates of duty on rum, and contained provisions similar to those in Article VIII of the original Cuban Agreement.

